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Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1991

AMERICAN ECONOMY INSURANCE
COMPANY, *et al.*,

Petitioners,

v.

BEVERLY L. SMITH, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The Court Of Appeals For
The Second District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An exception to ERISA coverage exists for employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws." 29 U.S.C. § 1003(b)(3).

The questions presented in this petition are:

(1) Does this exception apply to employee benefit plans which voluntarily provide workers' compensation benefits not required by applicable state law?

(2) Does this exception apply to employee benefit plans which include workers' compensation benefits as only one component of a broader benefit package?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner American Economy Insurance Company, the petitioner Lindsey & Newsom Claim Services, Inc. (formerly known as Lindsey & Newsom Insurance Adjusters, Inc.), and the respondents Beverly L. Smith and William Smith.

The parent company of American Economy Insurance Company is American States Insurance Company, whose parent company is Lincoln National Corporation. American Economy Insurance Company has no non-wholly-owned subsidiaries.

The parent company of Lindsey & Newsom Claim Services, Inc., is Morden & Helwig Group, Inc. Lindsey & Newsom Claim Services, Inc., has no non-wholly-owned subsidiaries.

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**Petition For A Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

The petitioners American Economy Insurance Company and Lindsey & Newsom Claim Services, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second District of Texas, entered in this proceeding on August 1, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second District of Texas is reported at 794 S.W.2d 574. It is reprinted in the appendix to this petition at pp. A-1-8.

The Supreme Court of Texas denied discretionary review without opinion.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 1, 1990. Timely motions for rehearing of that decision were overruled on September 11, 1990.

Timely applications to the Supreme Court of Texas for a writ of error were denied on March 27, 1991. A timely joint motion for rehearing of that decision was overruled on June 5, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1003(a) states in pertinent part:

[T]his subchapter shall apply to any employee benefit plan if it is established or maintained –

(1) by any employer engaged in commerce or in any industry or activity affecting commerce . . .

29 U.S.C. § 1003(b) states in pertinent part:

The provisions of this subchapter shall not apply to any employee benefit plan if -

* * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; . . .

29 U.S.C. § 1144(a) states in pertinent part:

[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

STATEMENT OF THE CASE

This is a suit by respondents Beverly Smith ("Smith") and her husband William Smith, which arises out of a workers' compensation claim filed by Smith in 1984. At the time of that claim, Smith was employed by Braum's Ice Cream Stores, Inc. ("Braum's"), in Tarrant County, Texas.

As a Braum's employee, Smith was a participant in Braum's employee benefit plan. (R. 49-50). That plan provided death, accidental death, dismemberment, disability, medical, hospital, and surgical benefits to eligible employees. (R. 49). It was funded through a workers' compensation insurance policy issued by petitioner

American Economy Insurance Company ("American Economy"), a group life and accidental death and dismemberment insurance policy, and a self-insured group accident, medical, and non-occupational disability benefit program. (R. 53-121, 130-98). The self-insured benefit program was "integrated" with the workers' compensation benefits, *i.e.*, was expressly limited to situations in which workers' compensation benefits were unavailable. (R. 103, 112, 180, 189).

Smith applied for and received workers' compensation medical and disability benefits for an occupational injury which she claimed to have suffered on December 22, 1984. She ultimately entered into a Compromise Settlement Agreement with American Economy to resolve her claim for further benefits for this injury. (R. 38, 344). After her agreed medical benefits ran out, however, Smith filed the present suit to set aside the Compromise Settlement Agreement on the basis of alleged misrepresentations to Smith regarding her physical condition by certain physicians selected by American Economy. (R. 21-24). Smith and her husband also sought damages from American Economy and from petitioner Lindsey & Newsom Claim Services, Inc. ("Lindsey & Newsom"), for alleged breach of a common-law duty of good faith and fair dealing. (R. 25-36).

American Economy and Lindsey & Newsom moved for summary judgment on the ground, *inter alia*, that the Smiths' damage claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). (R. 46-121, 308-13). The trial court granted summary judgment to both defendants. (R. 368, 369).

The Texas intermediate appellate court reversed the summary judgments and remanded the case for trial. It held that the damage claims were not preempted by ERISA, because Braum's' employee benefit plan was exempt from ERISA coverage under § 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), as a plan "maintained solely for the purpose of complying with applicable workmen's compensation laws." *Smith v. American Economy Insurance Co.*, 794 S.W.2d 574 (Tex. App. - Fort Worth 1990, writ denied), pp. A-1-8, *infra*. The Supreme Court of Texas denied discretionary review of this decision. (P. A-13, *infra*).

How the Federal Questions Were Presented

The federal questions sought to be raised in this petition were raised by American Economy and Lindsey & Newsom in their respective motions for summary judgment.¹ The district court granted these motions without

¹ The material allegations of each motion were as follows:

- 1) The plan under which Plaintiffs seek benefits is an employee benefit plan governed by ERISA;
- 2) ERISA pre-empts Plaintiffs' common law and statutory claims;
- 3) ERISA's savings clause does not apply to Plaintiffs' claim for damages; and
- 4) The employee benefit plan under which Plaintiffs seek benefits falls within ERISA's pre-emptive provision because it is not a plan designed solely to comply with the Texas Workers' Compensation Act.

(R. 47, 308). Under point #4, the defendants raised both of the specific questions presented in this petition.

opinion. (R. 368). These issues were next raised by American Economy and Lindsey & Newsom in their respective briefs in the state court of appeals.² The court of appeals addressed only the effect of the 29 U.S.C. § 1003(b)(3) exception. American Economy and Lindsey & Newsom raised the applicability of that exception in their

² The principal argument headings under Reply Point 1 in American Economy's brief as appellee were as follows:

- A. THE PLAN UNDER WHICH APPELLANTS SEEK BENEFITS IS AN EMPLOYEE BENEFIT PLAN GOVERNED BY ERISA.
- B. THE EMPLOYEE BENEFIT PLAN UNDER WHICH APPELLANTS SEEK BENEFITS FALLS WITHIN ERISA'S PRE-EMPTIVE PROVISION BECAUSE IT IS NOT A PLAN DESIGNED SOLELY TO COMPLY WITH TEXAS' WORKERS' COMPENSATION LAWS.
- C. ERISA PRE-EMPTS APPELLANTS' COMMON LAW CLAIMS.
- D. THE ERISA SAVINGS CLAUSE DOES NOT APPLY TO APPELLANTS' CLAIMS FOR DAMAGES.

Similar ERISA preemption arguments were presented under Lindsey & Newsom's first two reply points in its brief as appellee. Again the specific questions presented in this petition were raised.

respective applications to the Supreme Court of Texas for a writ of error;³ that court denied review without opinion.

REASONS FOR GRANTING THE WRIT

This case presents an important question of ERISA preemption – the applicability of ERISA to employee benefit plans which include workers' compensation benefits not required by state law – which has troubled and confused the federal district courts and which is, due to jurisdictional peculiarities, unlikely ever to be addressed by the federal courts of appeals. Indeed, the decision below, by an intermediate state appellate court, is the only known appellate decision on this important federal question.

29 U.S.C. § 1003(b)(3) exempts from ERISA coverage those employee benefit plans which are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." The applicability

³ American Economy's first point of error was:

The Court of Appeals erred in holding that the workers' compensation insurance program administered by American Economy is exempted from ERISA coverage under ERISA's "workers' compensation" exception.

Lindsey & Newsom raised the same issues in its two sub-points under its single point of error. Both defendants raised the specific questions presented in this petition.

of this exception to plans which provide workers' compensation benefits even though such benefits are not required by state law⁴ has split the federal district courts.⁵

⁴ Provision of workers' compensation benefits is completely voluntary in New Jersey and South Carolina, voluntary in Texas except for certain motor carriers, and voluntary in Wyoming except for employers engaged in extrahazardous occupations. 4 A. Larson, *The Law of Workmen's Compensation* App. A-7-1-3 (1990). Additionally, provision of benefits is voluntary for certain very small employers in 14 states, *id.* App. A-3-1, for employers of certain agricultural workers in 38 states, *id.* App. A-4-1-7, and for employers of certain domestic workers in 47 states, *id.* App. A-5-1-3.

⁵ The following cases have held the exception inapplicable to plans which provide voluntary workers' compensation benefits: *Wheat v. Litwin Engineers & Constructors, Inc.*, No. H-80-4380 (S.D. Tex. Feb. 2, 1989) (order denying motion to remand); *Peddicord v. Employers Mutual Casualty Co.*, No. CA-4-88-274-E (N.D. Tex. Jan. 31, 1989) (order denying motion to remand); *Patterson v. American States Insurance Co.*, No. CA-4-88-338-E (N.D. Tex. Jan. 11, 1989) (order denying motion to remand); *Productive Rehabilitation Institute for Ergonomics v. Allstate Insurance Co.*, No. CA-3-88-2361-C (N.D. Tex. Dec. 20, 1988) (order granting motion to dismiss). The following cases have held the exception applicable to such plans: *Fears v. Luedke*, 739 F. Supp. 327, 328 (E.D. Tex. 1990); *Wilson v. American States Insurance Co.*, No. CA-3-89-0319-F (N.D. Tex. Feb. 26, 1990) (memorandum opinion and order denying motion to dismiss); *Ramirez v. Service Lloyds Insurance Co.*, No. EP-88-CA-163 (W.D. Tex. Nov. 6, 1989) (order granting motion to remand); *Gibbs v. Service Lloyds Insurance Co.*, 711 F. Supp. 874, 878 (E.D. Tex. 1989); *Kroening v. American General Insurance Co.*, No. CA-3-88-2143-T (N.D. Tex. Mar. 31, 1989) (order remanding to state court); *Olivarez v. Utica Mutual Insurance Co.*, 710 F.

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The issue has generally arisen in the context of a suit for bad faith denial or delay of workers' compensation benefits, filed in state court by an injured worker against the workers' compensation insurance carrier, and removed to federal court by the carrier on the basis of ERISA preemption under *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). If the holding in such a case is against preemption (as it has been in a majority of the district court decisions), the suit is remanded, and 28 U.S.C. § 1447(d) prevents appellate review of the order of remand.⁶ Indeed, the one district court which has attempted to certify its order of remand for interlocutory appeal under 28 U.S.C. § 1292(b) has been rebuffed by an appellate holding that § 1447(d) precludes appellate review even by certification.⁷

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Supp. 642, 643 (N.D. Tex. 1989); *Foust v. City Insurance Co.*, 704 F. Supp. 752, 753-54 (W.D. Tex. 1989), *leave to appeal denied*, No. 89-9079 (5th Cir. May 31, 1989); *Morrison v. Utica National Insurance Co.*, No. CA-3-88-1447-T (N.D. Tex. Nov. 28, 1988) (order remanding action to state court).

⁶ If the decision is in favor of preemption, and therefore against remand, the plaintiff has no immediate right of appeal. *Bender v. Pennsylvania Co.*, 148 U.S. 502, 502 (1893). Although the preemption issue may be raised on appeal from the final judgment, settlements are often reached before a judgment is rendered on the merits, with the result again being that the preemption issue has never reached, and likely never will reach, a federal appellate court.

⁷ See *Foust v. City Insurance Co.*, 704 F. Supp. 752 (W.D. Tex. 1989) (Gee, Cir. J., sitting by designation), *leave to appeal denied*, No. 89-9079 (5th Cir. May 31, 1989). Accord, on the appellate jurisdictional point, *In re Bear River Drainage District*, 267 F.2d 849, 851-52 (10th Cir. 1959); contra, *National Audubon Society v. Department of Water*, 858 F.2d 1409, 1417 (9th Cir. 1988).

Thus it is that the preemption issue has reached the appellate courts only in the state system, by way of appeal from a state court summary judgment disposing on ERISA preemption grounds of the plaintiffs' claims for extra-contractual remedies under state law. Although state courts undoubtedly have full jurisdictional competence to adjudicate federal law issues, *e.g.*, *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79 (1981), it is nevertheless incongruous for the state courts to be, as they functionally are here, the sole appellate expositors of federal law. The situation is made doubly anomalous by the understandable tendency of the state appellate courts to place reliance on federal district court decisions in ascertaining federal law, despite the fact that circumstances have conspired to ensure that none of those decisions has been subjected to appellate review.

This Gordian knot can be untied only by this Court's review of such a state court decision. Absent review by this Court, federal district courts will (incorrectly, we submit) continue to unreviewably remand bad faith cases which were removed on ERISA preemption grounds, and state trial and appellate courts will (incorrectly, we submit) continue to rely on those unreviewable federal decisions in rejecting ERISA preemption.

The present case arises in a context well-suited for review by this Court. The Texas intermediate court has squarely held that the exception to ERISA for plans "maintained solely for the purpose of complying with applicable workmen's compensation laws" includes plans which provide workers' compensation benefits which "applicable workmen's compensation law" does not require. *Smith v. American Economy Insurance Co.*, 794

S.W.2d 574, 576 (Tex. App. – Fort Worth 1990, writ denied), p. A-4, *infra*. Likewise, the court below has clearly held (in apparent wanton disregard of this Court's holding in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107-08 (1983)) that a plan which provides workers' compensation benefits as part of a broader benefit package is nevertheless exempted from ERISA coverage as to its workers' compensation component. *Smith*, 794 S.W.2d at 576-77, p. A-4-5, *infra*. Both of these federal issues have been carefully and consistently preserved at each level of the state court system, and are ripe for this Court's review.

I. AN EMPLOYEE BENEFIT PLAN WHICH PROVIDES WORKERS' COMPENSATION BENEFITS NOT REQUIRED BY APPLICABLE STATE LAW CANNOT BE "MAINTAINED SOLELY FOR THE PURPOSE OF COMPLYING WITH APPLICABLE WORKMEN'S COMPENSATION LAWS."

This Court made clear in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), that whether a plan is "maintained solely for the purpose of complying with applicable workmen's compensation laws" under 29 U.S.C. 1003(b)(3) is not to be judged by the employer's subjective motive in maintaining the plan, but by the test of "whether the plan, as an administrative unit, provides only those benefits required by the applicable state law." 463 U.S. at 107. This and other language from *Shaw*⁸

⁸ Elsewhere in *Shaw* this Court referred to "the difficulty . . . that at least some of the benefit plans offered by the

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confirmed what common sense had already suggested: that an employee benefit plan can be maintained solely to comply with state law only when state law requires the provision of the employee benefits which the plan provides.

Shaw's reading of § 1003(b)(3) was consonant with the statute's legislative history: the House Report on the bill which ultimately became ERISA described the § 1003(b)(3) exception as applying to "[p]lans *required under* workmen's compensation, unemployment compensation, and disability insurance laws." H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4656 (emphasis supplied). *Shaw* was also consonant with decisions of several lower courts interpreting § 1003(b)(3) to apply only to plans maintained pursuant to "compulsory state insurance legislation," *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 764-65 (9th

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Airlines provide benefits not *required by*" New York's Disability Benefits Law, 463 U.S. at 106-07 (emphasis supplied); described its prior decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981), as bringing within ERISA coverage "plans that not only provide benefits *required by* such a law, but also 'more broadly service employee needs as a result of collective bargaining,'" 463 U.S. at 107 (emphasis supplied); and noted the undesirability of allowing ERISA coverage to depend "on what benefits the State *mandated under* disability, workmen's compensation, and unemployment compensation laws," *id.* (emphasis supplied).

Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), providing the benefits "required" by that legislation.⁹

Under *Shaw* and the other authorities cited, a Texas workers' compensation plan can *never* be a plan "maintained solely to comply with applicable workmen's compensation laws," for the simple reason that (for most employers) Texas law does not require that workers' compensation benefits be provided:

An employer is not compelled to become a subscriber under the Texas Workmen's Compensation Law. Whether he does or does not become a subscriber is strictly elective.

Consolidated Underwriters v. King, 160 Tex. 18, 325 S.W.2d 127, 129-30 (1959). Indeed, courts applying Texas law have been at great pains over the years to emphasize the

⁹ See *Employee Benefits Committee v. Pascoe*, 679 F.2d 1319, 1322 n.4 (9th Cir. 1982) (applying *Alessi* to plan which provided benefits beyond those "required" under Hawaii workers' compensation law); *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1306 (2d Cir. 1981) ("Particularly because state law does not *compel* employers to establish programs of this sort, it would be sensible to say, in the language of § 4(b)(3), that such programs are not maintained 'solely' to comply with state laws . . . ;" emphasis supplied), *vacated in part on other grounds sub nom. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Stone & Webster Engineering Corp. v. Ilesley*, 518 F. Supp. 1297, 1302 (D. Conn. 1981) (noting that state statute at issue did not "require" contributions to benefit fund), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983); *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 704 (N.D. Cal. 1977) (ERISA applies to "all types of plans not generally required by state law;" emphasis supplied), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

voluntary nature of the Texas workers' compensation system.¹⁰

The court below, employing reasoning from *Foust v. City Insurance Co.*, 704 F. Supp. 752, 753-54 (W.D. Tex. 1989), without citing that case, held that an employer must "comply" with the Texas workers' compensation law by purchasing insurance because failure to do so results under Texas law in forfeiture of common-law tort defenses, and thus that workers' compensation insurance is in fact "required" in Texas for purposes of § 1003(b)(3):

When Braum's decided to open a business in Texas and hire workers, Texas law confronted it with a choice: limited liability without fault to any worker injured on the job or unlimited liability only in the event of fault, but with no common-law defenses. Buying workers compensation insurance results in the first option; not doing so results in the second. The choice of an employer to depart from the general common-law tort system has already been made once an employer hires workers in Texas. When that is done, an employer has no choice but to comply with state law.

Smith, 794 S.W.2d at 576, p. A-4, *infra*.

¹⁰ See *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 160 (1919); *Ferguson v. Hospital Corp. International*, 769 F.2d 268, 273 (5th Cir. 1985); *Hartford Accident & Indemnity Co. v. Christensen*, 149 Tex. 79, 228 S.W.2d 135, 138 (1950); *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556, 559 (1916), *aff'd*, 249 U.S. 152 (1919); *Brown Services, Inc. v. Fairbrother*, 776 S.W.2d 772, 776 (Tex. App. - Corpus Christi 1989, no writ).

This reasoning is fallacious. There are many contexts in which the law permits a citizen to engage (or not to engage) in an entirely voluntary course of conduct, and then attaches one set of civil consequences if the citizen chooses that course of conduct and another set of civil consequences if the citizen chooses to do nothing. In such a situation, the citizen can scarcely be said to be "complying" with the law by doing something which the law "requires" him to do, even though the law emphasizes that he is not required to do it.

The lower court's reasoning also ignores the word "solely" in § 1003(b)(3). If one may "comply" with state law by establishing a workers' compensation plan, or alternatively may "comply" with state law by not establishing a workers' compensation plan, then how can it be said that one has established such a plan "solely" to comply with state law? Under an objective test of employer purpose, as is mandated by *Shaw*, factors other than compliance with "applicable workmen's compensation law" necessarily enter into the choice to establish such a plan.

The approach employed by the court below would inject undesirable uncertainty into the threshold question of ERISA coverage for workmen's compensation, unemployment compensation, and disability insurance plans, by forsaking a simple examination of easily ascertainable affirmative requirements of law in favor of an uncertain balancing of legal and practical incentives and disincentives for employers to provide particular benefits. Virtually every type of employee benefit which an employer provides will have some positive effect on the employer's legal rights and obligations. If "required" is stretched to

mean "highly desirable under the circumstances," courts will inevitably be drawn into a subjective evaluation, for which they are especially ill-equipped, of the pros and cons from the employer's point of view of particular employee benefits. Such distinctions are unworkable; the test should instead be whether a state legislature has affirmatively required a particular employee benefit as a matter of positive law, not whether the formal or informal civil consequences of failing to provide that benefit are minor or severe.

Such a limitation would precisely comport with the overall Congressional scheme embodied in ERISA. In enacting ERISA, Congress sought to "promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw*, 463 U.S. at 90, without creating undue employer disincentives which would damage "the public interest in encouraging the formation of employee benefit plans," *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Where the provision of particular benefits is required by positive state law, concern regarding disincentives is eliminated and state law requirements and remedies may be freely allowed without injuring employees by discouraging plan formation. Where, however, as here, the provision of benefits is a matter of employer choice (albeit a choice which the state influences through incentives and disincentives), there is a need for the balance provided by ERISA, so that unduly onerous state law requirements and remedies will not prevent employees from establishing plans. Thus a "bright-line" test separates those plans in need of ERISA protection from those which may safely remain outside ERISA's scope.

Even if the test for ERISA coverage were whether workers' compensation benefits were effectively required through employer incentives and disincentives, the Court of Appeals would have reached the wrong result as to Texas workers' compensation benefits. The unspoken assumption underlying the Court of Appeals' reasoning is that failing to provide workers' compensation benefits is somehow horribly onerous for an employer, making such benefits elective in name only. That is simply not the case in Texas. While liability for a serious injury to an employee can indeed be devastating to a non-subscribing employer, the premiums for workers' compensation insurance (which exceed 25% of payroll in some industries) can likewise be devastating to a subscriber who is struggling to stay in business. The abolition of common-law defenses for non-subscribing employers,¹¹ while undoubtedly significant in an earlier era, is diminished in importance by modern tort law developments such as the abolition of contributory negligence and assumption of the risk and the increasing incidence of joint and several liability. Perhaps the clearest proof that Texas employers face a genuine choice with respect to providing workers' compensation benefits lies in the large number of Texas employers who have chosen to forego such insurance.¹²

¹¹ *Sec Tex. Rev. Civ. Stat. art. 8306, § 1.*

¹² The Texas Workers' Compensation Commission recently estimated that 40% of Texas employers – some 128,000 in number – do not subscribe to workers' compensation insurance. *Dallas Times Herald*, June 11, 1991, at B-1.

The § 1003(b)(3) exception to ERISA is to be construed narrowly. *Stone & Webster Engineering Corp. v. Ilsley*, 518 F. Supp. 1297, 1301 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983). The court below has overlooked that principle and instead stretched to find a requirement of state law where there emphatically is none. Workers' compensation benefits are not required in Texas, and are not provided to comply with applicable workers' compensation law. They are instead simply one more employee benefit, albeit one which state law encourages by providing incentives to employers.

II. AN EMPLOYEE BENEFIT PLAN WHICH INCLUDES WORKERS' COMPENSATION BENEFITS AS ONLY ONE COMPONENT OF A BROADER BENEFIT PACKAGE CANNOT BE "MAINTAINED SOLELY FOR THE PURPOSE OF COMPLYING WITH APPLICABLE WORKMEN'S COMPENSATION LAWS."

In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), this Court explained that the § 1003(b)(3) exception has no applicability to plans which, in addition to providing benefits to comply with state law, "more broadly serve employee needs as a result of collective bargaining." 451 U.S. at 523 n.20. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), the Court noted and extended the *Alessi* holding, reasoning that the § 1003(b)(3) exception applies only to a plan which, "as an administrative unit, provides only those benefits required by the applicable state law." 463 U.S. at 107.

In the present case, the court below, without citing *Alessi* or *Shaw*, reasoned that a "workers compensation plan" could not possibly be brought within ERISA coverage by including workers' compensation benefits among a variety of employee benefits within a single plan, because such a result would supposedly "preempt all lawsuits which involved workers compensation where other employee benefits were also provided," and thereby supposedly conflict with the Congressional intent (embodied in 28 U.S.C. § 1445(c)) to prohibit removal of workers' compensation cases. *Smith v. American Economy Insurance Co.*, 794 S.W.2d 574, 576 (Tex. App. – Fort Worth 1990, writ denied) (emphasis in original), p. A-5-6, *infra*. In so holding, the court totally ignored the teachings of *Alessi* and *Shaw* and misapprehended the implications of an ERISA preemption holding in this case.

As the Court pointed out in *Shaw*, 29 U.S.C. § 1003(b) exempts benefit plans, not individual benefits within a plan. The statute thereby prevents a single employee benefit plan from being subject in part to ERISA and in part to a myriad of state regulations under workers' compensation, unemployment compensation, and disability insurance laws. "The administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent." *Shaw*, 463 U.S. at 107-08. Thus workers' compensation benefits, whether required by state law or not, *are* within ERISA coverage when included with other employee benefits in a plan which is administered as a single unit.¹³ The court

¹³ The summary judgment record clearly reflected that the workers' compensation benefits provided to Braum's

below erred in embarking upon an uncertain analysis of implications in the face of the clear statutory language as interpreted in *Alessi* and *Shaw*.

Moreover, the court below incorrectly analyzed those implications. ERISA preemption of state laws relating to employee benefit plans which commingle workers' compensation benefits with other employee benefits simply does not result in massive preemption of workers' compensation claims or in a flood of removed workers' compensation cases in the federal courts. To begin with, *Shaw* clearly permits states to require that workers' compensation benefits be provided through an administrative unit separate from employee benefit plans which provide other benefits. 463 U.S. at 108. Such an administrative unit would be exempt from ERISA if it provided only benefits required by state law. See Section I, *supra*. Additionally, suits to recover workers' compensation insurance benefits, in contradistinction to suits such as the present seeking extracontractual remedies, would likely fall within the "savings" clause of ERISA, 29 U.S.C. § 1144(b)(2)(A), as involving laws which regulate insurance. See generally *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45-48 (1987). Finally, removal of suits seeking only workers' compensation benefits (again in contradistinction to suits seeking bad faith damages) is prohibited

(Continued from previous page)

employees were part of a single employee benefit plan which included numerous other employee benefits. (R. 49-51). Moreover, the integration of many of the other plan benefits with the workers' compensation benefits demonstrates that there was no separately administered workers' compensation plan. See *PPG Industries Pension Plan A (CIO) v. Crews*, 902 F.2d 1148, 1151 (4th Cir. 1990).

by 28 U.S.C. § 1445(c), whether or not such suits are governed or affected by ERISA. In short, no untoward consequences will arise if § 1003(b)(3), *Alessi*, and *Shaw* are applied to this case as they are written.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted,

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APPENDIX



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A-1

NO. 2-89-166-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

BEVERLY L. SMITH AND WILLIAM SMITH

APPELLANTS

VS.

AMERICAN ECONOMY INSURANCE COMPANY and
LINDSEY & NEWSOM INSURANCE ADJUSTERS, INC.

APPELLEES

FROM THE 141ST DISTRICT COURT OF TARRANT
COUNTY

OPINION

The Smiths appeal from a grant of summary judgment in favor of the appellees in a workers compensation case. In four points of error, they assert that the trial court erred in granting a Motion for Summary Judgment because: (1) their causes of action are not preempted by the Employees Retirement Income Security Act (hereinafter referred to as "ERISA"); (2) they are not judicially estopped to assert their causes of action; (3) the summary judgment motion was not supported by evidence sufficient to support such a judgment; and (4) the defenses urged by the Motion for Summary Judgment were not supported by the pleadings. We reverse the cause and

remand for further proceedings because a case challenging a workers compensation claim is not preempted by ERISA, nor is it judicially estopped by a prior Compromise Settlement Agreement.

This is a workers compensation case. Appellees are the American Economy Insurance Company, which is a workers compensation carrier, and Lindsey & Newsom Insurance Adjusters, Inc., which is American's adjuster. The Smiths originally filed suit to set aside an earlier workers compensation Compromise Settlement Agreement (CSA) claiming they detrimentally relied on misrepresentations of the treating physicians recommended by the defendants. In addition, the Smiths claimed American failed to exercise good faith in the handling of Beverly Smith's claim.

On December 22, 1984, Beverly injured her lower back while attempting to move a heavy box of food at work. Two days later, she was admitted to the emergency room of a local hospital. The emergency room doctor referred her to an orthopedic surgeon, but she was refused medical care because appellees refused to accept financial responsibility for her treatment. Appellees instead told Beverly to report to three different doctors, all of whom basically diagnosed her with a mild back strain. Based on these reports, she settled her claim for \$12,360. Unfortunately, Beverly's pain did not lessen and she pursued an independent physician's diagnosis. It was then discovered that she suffered from a herniated intervertebral disk. She had to have the disk removed, and the surgery left her with a permanent partial disability and future medical expense.

The Smiths filed suit against appellees charging that: the three doctors as appellees' agents had misrepresented to Beverly the true nature of her injuries; Beverly had relied on the misrepresentations to her detriment; and appellees had failed to exercise good faith and fair dealing with regard to her workers compensation claim. Appellees responded with a Motion for Summary Judgment asserting that the suit was barred on the following two grounds: (1) the workers compensation claim was a part of an employees benefits plan, and therefore preempted by the Employees Retirement Income Security Act, 29 U.S.C. §§ 1001 to 1461 (1974); and (2) the claim was judicially estopped because of Beverly's prior agreement to the compromise settlement. The trial court, without noting which argument it found persuasive, granted appellees' Motion for Summary Judgment.

A close examination of ERISA reveals that it excepts from coverage a state workers compensation plan if "such [a] plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; . . . " 29 U.S.C. §1003(b)(3). This provision is generally intended to exempt state workers compensation plans from preemption by ERISA, no doubt to correspond with previous Congressional legislation, an issue addressed later in this opinion. Appellees assert that §1003 does not apply to Beverly's workers compensation claim because this workers compensation program is not maintained "solely" for the purpose of complying with Texas law. However, they admit that the workers compensation coverage in this case was totally separate and apart from any other insurance coverage provided by

Beverly's employer, Braum's Ice Cream Stores, and the workers compensation program was administered under totally separate and independent procedures from any other employee benefits provided by Braum's.

Appellees reason that the workers compensation program is not mandatory and Braum's did not maintain the plan solely for the purpose of complying with applicable workers compensation laws which the language of the exclusion requires. This argument assumes that because an employer can choose either of two courses of action in order to comply with Texas law, the one which it chooses is not chosen "solely" to comply with this law. This position might persuade us if an employer could purchase workers compensation coverage for its workers on a voluntary basis in order to supplement the employees' remedies against an employer for injuries on the job. However, this is not the law in Texas.

When Braum's decided to open a business in Texas and hire workers, Texas law confronted it with a choice: limited liability without fault to any worker injured on the job or unlimited liability only in the event of fault, but with no common-law defenses. Buying workers compensation insurance results in the first option; not doing so results in the second. The choice of an employer to depart from the general common-law tort system has already been made once an employer hires workers in Texas. When that is done, an employer has no choice but to comply with state law.

Appellees counter that because Braum's offers a variety of employee benefits, of which workers compensation

is one small part, the workers compensation plan is somehow intricately embedded in an employee benefits plan and therefore preempted by ERISA. If such an argument had merit, it could be used to preempt *all* lawsuits which involved workers compensation where other employee benefits were also provided. Such a position clearly flies into the face of Congressional intent. Congress expressly barred removal of workers compensation lawsuits to federal courts in 1958 with the passage of 28 U.S.C. §1445(c) (Supp. 1990), which states: "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." Put simply, "Section 1445(c) prohibits removal of *all* workers' compensation cases, . . ." *Olivarez v. Utica Mutual Ins. Co.*, 710 F. Supp. 642, 643 (N.D. Tex. 1989). See also S. Rep. No. 1830 in 1958 U.S. Code Cong. & Admin. News 3099, 3105, 3106 (Congress' intent was to stop the removal of worker's compensation cases which were increasing "the already overburdened docket of the Federal courts, the congestion in some of which is now most deplorable").

There is no justification for Texas courts to strain to find a way to burden federal courts with all of their workers compensation suits. Federal courts themselves treat workers compensation cases as suits which involve such a technical statutory form "that they have little real business [being] in a federal court." *Olivarez*, 710 F. Supp. at 643; *Kay v. Home Indem. Co.*, 337 F.2d 898, 901 (5th Cir. 1964). Removal of workers compensation cases from state courts to federal courts is forbidden by the express language of federal law. *Kay*, 337 F.2d at 901; 28 U.S.C. §1445 (c). ERISA itself states that "[n]othing in this subchapter

shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . ." 29 U.S.C. §1144 (d). Thus, Smith's first point of error is sustained.

In point of error two, the Smiths assert that the trial court erred in granting summary judgment because of Beverly's entering into a prior CSA. She originally settled her claim for workers compensation benefits by signing a CSA in reliance upon the alleged misrepresentations of the three doctors she was sent to by appellees. The appellees denied her access to a physician of her own choice by withholding financial approval for any examinations or treatment to perform diagnostic tests by her own doctor to determine the actual cause and extent of her condition. The Smiths assert that the reports of appellees' physicians are erroneous because later diagnostics revealed the actual cause of Beverly's pain to be a herniated intervertebral disk, not the mild back strain which they reported.

Appellees assert that the Smiths' case is judicially estopped from trial because of Beverly's previously signing the CSA. However, courts have long entertained cases challenging such agreements. *See, e.g., Brannon v. Pacific Employers Ins. Co.*, 148 Tex. 289, 224 S.W.2d 466 (1949). The rules of common law applicable to suits involving rescission and cancellation are also applicable to suits brought to set aside compromise settlements. *Id.* at 468; *Johnston v. Barnes*, 717 S.W.2d 164, 165-66 (Tex. App.-Houston [14th Dist.] 1986, no writ); *Gwinn v. Associated Employers Lloyds*, 280 S.W.2d 624 (Tex.Civ.App.-Fort Worth 1955, writ ref'd n.r.e.).

Judicial estoppel is not applicable to this case. The doctrine of judicial estoppel applies to a party who presently pleads a position contrary to another position taken in former legal proceedings made under oath. *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292, 295 (1956); *Yarber v. Pennell*, 443 S.W.2d 382, 384 (Tex.Civ.App.—Dallas 1969, writ ref'd n.r.e.). Appellees do not point this court to previous legal pleadings signed by Beverly under oath in another lawsuit which pertain to the current position she is asserting. Instead, they cite this court to *Izaguirre v. Texas Employers' Ins. Ass'n*, 749 S.W.2d 550 (Tex.App.—Corpus Christi 1988, writ denied), claiming that the plaintiffs therein sued upon the same theories as the Smiths. A close reading of *Izaguirre* reveals major differences, however. *Izaguirre* sued her workers compensation carrier for two reasons: (1) she alleged it intentionally denied her workers compensation claim when she first filed for benefits; and (2) once required to pay, the carrier delayed benefits payment. Beverly made neither accusation in this case. Instead, she alleged that she was not paid enough, because appellees misled her into thinking her claim was worth less than it actually was worth.

In order to set aside a CSA, a claimant must show: the misrepresentations concerning his injuries were made by the employer or compensation carrier; he relied on those misrepresentations when making the settlement; and there was a meritorious claim for more compensation than had been paid. *Rodriguez v. American Home Assur. Co.*, 735 S.W.2d 241, 242 (Tex. 1987); *Brannon*, 148 Tex. at 293, 224 S.W.2d at 468. All of these facts are alleged by Beverly in her lawsuit. Thus, material fact issues do exist

in this case, and the Smiths' second point of error is sustained.

Because the Smiths' first two points of error address the only two points raised in support of appellees' Motion for Summary Judgment, and each is sustained, it is unnecessary that we address the Smiths' remaining points.

The judgment of the trial court is reversed and the case is remanded for trial.

/s/ David F. Farris
DAVID FARRIS,
JUSTICE

PANEL A
FARRIS, LATTIMORE, AND DAY, JJ.
PUBLISH

AUG 1 1990

NO. 141-107205-87

BEVERLY L. SMITH)	IN THE DISTRICT
VS.)	COURT OF TARRANT
)	COUNTY, TEXAS
AMERICAN ECONOMY)	141ST JUDICIAL
INSURANCE COMPANY,)	DISTRICT
ET AL		

**ORDER ON AMERICAN ECONOMY INSURANCE
COMPANY'S MOTION FOR SUMMARY JUDGMENT**

After full consideration, it is **ORDERED**, **ADJUDGED AND DECREED** that American Economy Insurance Company's Motion for Summary Judgment be, and hereby is, granted. Pursuant thereto, it is **ORDERED**, **ADJUDGED AND DECREED** that Plaintiff, Beverly L. Smith, recover nothing of and from American Economy Insurance Company and that American Economy Insurance Company be discharged to go hence without delay. All costs of court are hereby taxed against Beverly L. Smith.

SIGNED this 26th day of June, 1989.

/s/ Dixon W. Holman
JUDGE PRESIDING

NO. 141-107205-87

BEVERLY L. SMITH	§	
ET VIR.	§	IN THE DISTRICT
VS.	§	COURT OF TARRANT
	§	
AMERICAN ECONOMY	§	COUNTY, TEXAS
INSURANCE COMPANY	§	141ST JUDICIAL
and LINDSEY AND	§	
NEWSOM INSURANCE	§	DISTRICT
ADJUSTERS, INC.	§	

ORDER ON LINDSEY AND NEWSOM
INSURANCE ADJUSTER, INC.'S
MOTION FOR SUMMARY JUDGMENT

After full consideration, it is ORDERED, ADJUDGED and DECREED that Lindsey and Newsom Insurance Adjusters, Inc.'s Motion for Summary Judgment, be, and hereby is granted. Pursuant thereto, it is ORDERED, ADJUDGED and DECREED that Plaintiffs, Beverly L. Smith and William Smith recover nothing of and from Lindsey and Newsom Insurance Adjusters, Inc.

SIGNED this 28th day of June, 1989.

/s/ Dixon W. Holman
JUDGE PRESIDING

NO. 141-107205-87

BEVERLY L. SMITH	§	
ET VIR.	§	IN THE DISTRICT
VS.	§	COURT OF TARRANT
AMERICAN ECONOMY	§	COUNTY, TEXAS
INSURANCE COMPANY	§	141ST JUDICIAL
and LINDSEY AND	§	DISTRICT
NEWSOM INSURANCE	§	
ADJUSTERS, INC.	§	

FINAL JUDGMENT

It appearing to the Court that all matters pending and in dispute in the above styled and numbered cause have been determined and decided by the Court's grant of the respective Motions for Summary Judgment filed by Defendants American Economy Insurance Company and Lindsey & Newsom Insurance Adjusters, Inc.

It is accordingly ORDERED, ADJUDGED and DECREED by this Court that Plaintiffs Beverly L. Smith and William Smith recover nothing of or from Defendants American Economy Insurance Company and Lindsey and Newsom Insurance Adjusters, Inc. It is further ORDERED that all costs of court are hereby taxed against Plaintiffs, Beverly L. Smith and William Smith.

It is further ORDERED that all other relief not specifically granted herein is hereby specifically denied.

SIGNED this 28th day of June, 1989.

/s/ Dixon W. Holman
JUDGE PRESIDING

COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

Beverly L. Smith and)
William Smith)
vs.) No. 2-89-166-CV
American Economy Ins. Co. &)
Lindsey and Newsom Ins.)
Adjusters, Inc.)

ORDER

On this day came on to be considered the motion of appellee, American Economy Insurance Company, and the motion of appellee, Lindsey and Newsom Insurance Adjusters, Inc., for rehearing.

It is the opinion of this Court that said motion should be and is hereby **overruled**. It is the order of this Court that the opinion and judgment of August 1, 1990 stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 11th day of September, 1990.

/s/ David F. Farris
DAVID F. FARRIS
JUSTICE

OVRULE.CVrf

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 27, 1991

[Names And Addresses Of Counsel Omitted In Printing]

RE: Case No. D-0424

Style: AMERICAN ECONOMY INSURANCE COMPANY
ET AL. v. BEVERLY L. SMITH ET AL.

Dear Counsel:

Both applications for writ of error in the
above referenced case were this day denied with
the notation, Writ Denied.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin

Blanca Morin, Deputy

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 5, 1991

[Names And Addresses Of Counsel Omitted In Printing]

RE: Case No. D-0424

Style: AMERICAN ECONOMY INSURANCE COMPANY
ET AL. v. BEVERLY L. SMITH ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk

by /s/ Courtland Crocker
Courtland Crocker, Deputy



2
No. 91-379

Supreme Court, U.S.
FILED

OCT 2 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

AMERICAN ECONOMY INSURANCE
COMPANY, et al.,

Petitioners,

v.

BEVERLY L. SMITH, et al.,

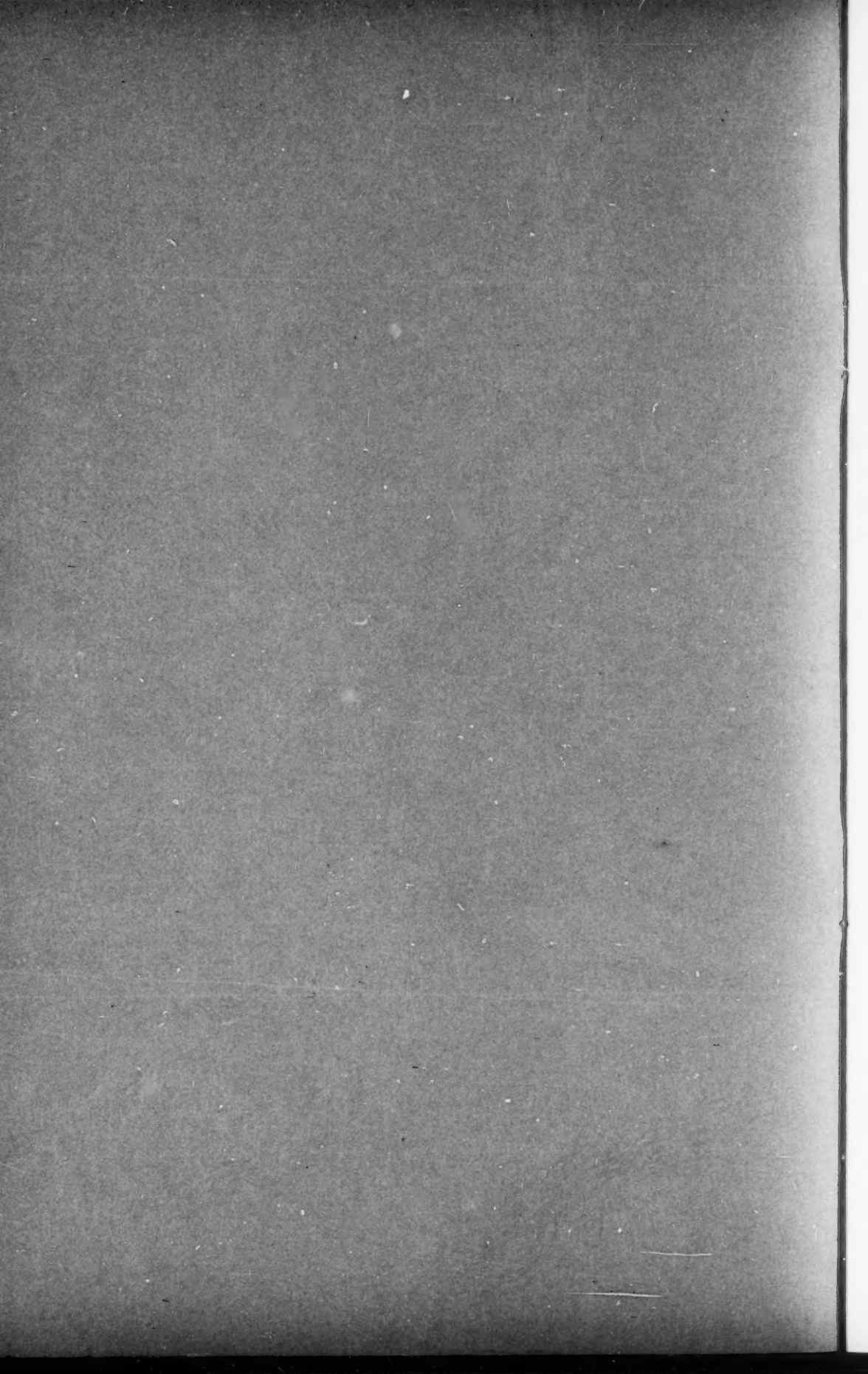
Respondents.

Petition For A Writ Of Certiorari To The
Court Of Appeals For
The Second District Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED (RESTATED)

An exception to ERISA coverage exists for employee benefit plans "maintained solely for the purpose of complying with applicable workman's compensation laws." 29 U.S.C. § 1003(b)(3).

The questions (restated) presented in this petition are:

1) Does this ERISA exception apply to a policy of Workers' Compensation obtained by an employer in compliance with applicable state law which penalizes non-conforming employers by withdrawal of common law defenses in direct negligence actions by injured employees not covered by such insurance?

2) Does this exception apply to a policy of Workers' Compensation insurance which complies solely with applicable state workers' compensation laws and administrative procedures under which benefits are administered by a separate administrative unit?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner American Economy Insurance Company, the petitioner Lindsey & Newsom Claim Services, Inc. (formerly known as Lindsey & Newsom Insurance Adjusters, Inc.), and the respondents Beverly L. Smith and William Smith.

Petitioners have identified the parent company of the petitioners as follows:

The parent company of American Economy Insurance Company is American States Insurance Company, whose parent company is Lincoln National Corporation. American Economy Insurance Company has no non-wholly-owned subsidiaries.

The parent company of Lindsey & Newsom Claim Services, Inc., is Morden & Helwig Group, Inc.; Lindsey & Newsom Claim Services, Inc., has no non-wholly-owned subsidiaries.

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No. 91-379

In The
Supreme Court of the United States
October Term, 1991

AMERICAN ECONOMY INSURANCE
COMPANY, et al.,

Petitioners,

v.

BEVERLY L. SMITH, et al.,

Respondents.

**Petition For A Writ Of Certiorari To The
Court Of Appeals For
The Second District Of Texas**

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Beverly L. Smith and William Smith, respectfully pray that Petitioners' petition for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Second District of Texas, be in all things denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second District of Texas is reported at 794 S.W.2d 574.

The Supreme Court of Texas denied discretionary review without opinion.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 1, 1990. Timely motions for rehearing of that decision were overruled on September 11, 1990.

Timely applications to the Supreme Court of Texas for a writ of error were denied on March 27, 1991. A timely motion for rehearing of that decision was overruled on June 5, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1003(b) states in pertinent part:

The provisions of this subchapter shall not apply to any employee benefit plan if -

* * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; . . .

STATEMENT OF THE CASE

This is a suit by Respondents Beverly Smith ("Smith") and her husband William Smith arising out of a workers' compensation claim filed by Smith in 1984. Petitioners are the American Economy Insurance Company ("American Economy"), which is a workers' compensation carrier, and Lindsey & Newsom Insurance Adjusters, Inc. ("Lindsey & Newsom"), which is American Economy's adjuster.

At the time of her injuries, Beverly Smith was employed by Braum's Ice Cream Stores, Inc. ("Braum's") in Tarrant County, Texas. Braum's was then insured under a workers' compensation program that was totally separate and apart from any other insurance coverage provided by Braum's to its employees. Moreover, Braum's workers' compensation plan was administered under totally separate and independent procedures from any other employee benefits plan provided by Braum's. (R. 20, 22, 23).

After sustaining her injury, Smith sought medical treatment from an orthopedic doctor, but she was refused medical care because Petitioners refused to accept financial responsibility for her treatment. Petitioners instead directed Smith to report to three different doctors, who rendered opinions on her condition.

In reliance on the medical records and reports of these three doctors, Smith settled her claim. This settlement was approved by the Texas Industrial Accident Board in accordance with the Texas Workers' Compensation Act and the administrative procedures established by the Texas Industrial Accident Board. (R. 24, 38).

Subsequently, Smith learned that her injury was more severe than the mild back strain as diagnosed by Petitioners' doctors. Smith's physicians performed further diagnostic tests and discovered that she suffered from a herniated, intervertebral disk. She underwent surgery for the removal of the disk and was left with a permanent partial disability and future medical expenses.

Smith then filed suit to set aside her prior settlement and to reopen her claim before the Texas Industrial Accident Board. In addition, Smith sued Petitioners for damages on the basis of misrepresentation by Petitioners' agents, Smith's detrimental reliance on Petitioners' doctors' reports, and Petitioners' breach of the duty of good faith and fair dealing. (R. 19-38).

American Economy and Lindsey & Newsom moved for summary judgment on the ground, *inter alia*, that the Smiths' damage claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"); (R. 46-121, 308-13). The trial court granted summary judgment to both defendants. (R. 368, 369).

The Texas Court of Appeals reversed the summary judgment and remanded the case for trial. The Court of Appeals held that Braum's workers' compensation plan was maintained *solely* for the purpose of complying with Texas' workers' compensation law. Thus, under 29 U.S.C. § 1003(b)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), the Court of Appeals found that Smith's claims were not preempted by ERISA federal laws. The Court of Appeals rejected Petitioners arguments that the plan was intricately embedded with

Braum's other insurance and employee benefits. Pet. A-1-8.

The Supreme Court of Texas denied discretionary review of this decision. (P. A-13, *infra*).

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Respondents acknowledge that Petitioners sought to raise the federal questions presented herein as stated in their petition.

REASONS FOR DENYING THE WRIT

This case presents a fact question as to whether the workers' compensation policy as written by American Employers and administered by the Texas Industrial Accident Board is a plan "maintained solely for the purpose of complying with applicable workmens' compensation laws . . . " and thus exempt from ERISA coverage pursuant to 29 U.S.C. § 1003(b)(3).

Petitioners concede that " . . . state courts undoubtedly have full jurisdiction to adjudicate federal law issues," e.g. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79 (1981); Petitioners' Brief, p. 10. Here the state court, fully recognizing the ERISA preemptions and regulations applicable to employee benefit plans, made a factual determination that American Economy's policy of insurance in question fell squarely within the ERISA exemption. 29 U.S.C. § 1003(b)(3).

I. A SEPARATE POLICY OF INSURANCE WHICH PROVIDES ONLY WORKERS' COMPENSATION BENEFITS REQUIRED BY STATE LAW AND ADMINISTERED AS A SEPARATE UNIT IS EXEMPT FROM ERISA PREEMPTION.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court established a two-fold test to determine whether a plan is "maintained solely for a purpose of complying with applicable workmen's compensation laws" under 29 U.S.C. 1003(b)(3). The test is whether, in practice, the plan is administered as a separate administrative unit and whether it provides only those benefits required by state law. *Shaw*, 463 U.S. at 107.

Texas created a statutory administrative body, the Industrial Accident Board, now known as the Texas Workers' Compensation Commission. Tex. Rev. Civ. Stat. Art. 8307 § 1. This administrative body was empowered to create rules to carry out the provisions of the workers' compensation benefit program in Texas. Texas Register, Rules of the Industrial Accident Board Workers Compensation. These administrative rules, together with the statutory provisions of the Texas Workers' Compensation Act (Tex. Rev. Civ. Stat. arts. 8306-8309-1), provide a complete administrative plan for the workers' compensation program in Texas.

Under this statute, employers in Texas are not required to subscribe to workers' compensation insurance (Tex. Rev. Civ. Stat. art. 8306). However, once the employer elects to provide workers' compensation coverage, the employer then is required to accept the rights and responsibilities imposed by the statute.

Upon subscription, the employer *must* obtain insurance coverage through a licensed insurance company or through self-insurance. Texas has provided comprehensive guidelines and requirements that mandate what medical benefits and disability benefits must be provided by the employer through its insurance carrier to qualify as workers' compensation coverage. Tex. Rev. Civ. Stat. Art. 8306. The employer is *not free* to establish his own plan to compensate employees who suffer from occupational injuries. Only by providing those benefits *required* by the Texas workers' compensation statute and by submitting to administration of such benefits by the appropriate state agency can the employer avoid penalties set by the workers' compensation statute.

The insurer for an employee who subscribes to the Act becomes *absolutely liable* to pay workers' compensation benefits when an employee is injured in the course and scope of his employment. Tex. Rev. Civ. Stat. art. 8306 § 3a. However, the employer's liability is limited. In return, the employee of subscribers lose their right to sue their employer under the common law or under statute, unless the employee *timely* notifies the employer that he declines the workers' compensation coverage.

If the employer chooses *not* to subscribe, however, the injured employee may sue for common law and statutory damages. In addition, the non-subscribing employer loses all common law defenses in the law suit against it by an injured employee. In addition, the employer faces unlimited liability. Tex. Rev. Civ. Stat. art. 8306, § 1, 4. Thus the benefit and importance of obtaining coverage under the state workers' compensation law is obvious.

Moreover, a non-subscribing employer *must* notify the Commission that he is declining to subscribe *in the manner and time prescribed* by Commission rules. Otherwise, his failure to notify the Commission subjects the employer to a monetary penalty for each day of noncompliance. Tex. Rev. Civ. Stat. art. 8306 § 3.22. Thus, although the employer may opt out of Texas workers' compensation program, the employer is *still bound* by the workers' compensation law in important respects. The decision to subscribe or not to subscribe is not wholly "free," and "voluntary," or "strictly elective," as Petitioners would have this Court believe.

In this case, Braum's elected to provide workers' compensation coverage under Texas' workers' compensation statute. Braum's activities with respect to its workers' compensation coverage was governed *exclusively* by the Industrial Accident Board. The rules of administration of the workers' compensation plan was governed by the Industrial Accident Board with penalties for non-compliance imposed and determined by the Industrial Accident Board.

Moreover, Braum's procured a policy of workers' compensation insurance from American Economy which by its very terms complied with those terms required by the Texas Workers' Compensation Act. American Economy, as the employer's insurer for workers compensation carrier, is also governed by rules of the Industrial Accident Board.

II. THOSE PLANS LIMITED TO WORKMENS' COMPENSATION BENEFITS, UNEMPLOYMENT COMPENSATION BENEFITS AND DISABILITY BENEFITS SPECIFIED BY WORKERS' COMPENSATION LAW, WHICH DO NOT IMPINGE UPON THE ADMINISTRATION OF OTHER CO-EXISTING EMPLOYEE BENEFIT PLANS PROVIDED BY AND ADMINISTERED BY THE EMPLOYER, QUALIFY FOR EXEMPTION FROM ERISA PRE-EMPTION.

The presence of exclusionary clause 29 U.S.C. 1003(b) (3) in the ERISA statute bespeaks the intent of the framers of the statute to exclude workers' compensation programs which do not impact upon other aspects of 'employer benefit plans' or their administration. In *Alessi v. Raybestos - Manhattan, Inc.*, 451 U.S. 504 (1981), this Court upheld the preemption by federal law in New Jersey's workers' compensation statute only insofar as it impacted upon pension benefits governed by ERISA. *Allessi*, 451 U.S. at 506. However, this Court did *not* mandate preemption of the *whole* New Jersey workers' compensation statute.

The purpose of ERISA preemption is to provide uniform regulation and administration by employers of employee benefit plans. *Ft. Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987):

Congress intended preemption to afford employers advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to *benefits whose provisions by nature require an ongoing administrative program to meet the employer's obligation*. It is for

this reason that Congress pre-empted state laws relating to *plans* rather than simply to benefits.

Id. at 11 (emphasis added).

Where a state, by law, has established required benefits for workmens' compensation plans, unemployment or disability insurance benefits and where such programs are not administered by the *employer* as part of his total employee benefit plan, but as a separate administrative unit, the ERISA exemption applies. 29 U.S.C. § 1003(b)(3). Accord *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983):

Only separately administered disability plans maintained solely to comply with the Disability Benefit Law are exempt from ERISA coverage under § 4(b)(3).

Id.

As a Braum's employee, Smith was eligible to participate in Braum's employee benefit plan (R 49-50). That plan provided a group life and accidental death and dismemberment insurance policy issued by a company *other than* American Economy and a group accident, medical and non-occupational disability benefit program that was self-insured. (R 53-121, 130-98). There was no interconnection between the workers' compensation plan and other benefits provided through other programs offered by Braum's as part of its employee benefit plan.

American Economy's policy serves no other purpose than to comply with the Texas Workers' Compensation Act. ERISA expressly does not apply to plans that have as their entire purpose compliance with state law. In this case, the *entire* policy at issue was a workers' compensation plan that was required to be in place strictly

pursuant to Texas' workers' compensation law to which Braum's elected to subscribe. The entire plan was regulated by the workers' compensation statute. Braum's workers' compensation policy did not contain a single benefit not required by Texas' workers' compensation law. Therefore, ERISA does not preempt the legal issues considered in this case.

CONCLUSION

For the reasons stated herein, the writ of certiorari should be denied in this case.

Respectfully submitted,

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(3)
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In The
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v.

BEVERLY L. SMITH, et al.,

Respondents.

Petition For A Writ Of Certiorari To The
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PETITIONERS' REPLY MEMORANDUM

The petitioners American Economy Insurance Company and Lindsey & Newsom Claim Services, Inc., respectfully submit this reply memorandum in support of their petition for a writ of certiorari in this matter.

ARGUMENT

The respondents mischaracterize this case as one involving fact questions and factual determinations by the courts below. The case arises on summary judgment; the respondents did not even attempt to controvert the summary judgment evidence produced by the petitioners. The decisions of the Texas courts in this case were

decisions of pure law, applying the provisions of ERISA to these uncontroverted facts. Neither the posture of the case nor the state of the record permitted any subjective fact-finding.

The respondents also mischaracterize the record. The undisputed evidence fails to show, as the respondents allege, that there was no interconnection between the workers' compensation portion of Braum's' employee benefit plan and the portions of the plan providing other benefits. It instead shows that Braum's' employee benefit plan "as a whole is designed to provide a broad spectrum of hospital, medical, life and disability benefits to eligible Braum's employees and their beneficiaries, regardless of whether the employee suffers a disability on or off the job." (R. 50-51). The record further shows that the self-insured benefit portion of the plan was "integrated" with the workers' compensation portion of the plan, providing benefits only when workers' compensation benefits were unavailable. (R. 103, 112, 180, 189).

The respondents' argument that workers' compensation benefits are in fact "required" in Texas, such that an employer who establishes a plan which provides those benefits necessarily does so "solely for the purpose of complying with applicable workmen's compensation laws," is an argument which proves too much. Although the state prescribes the form and content of workers' compensation policies,¹ it likewise prescribes the form

¹ As an aside, however, the respondents are incorrect in stating that a Texas employer may not establish his own plan to compensate employees who suffer from occupational injuries. Such a plan may indeed be, and often is, established by an

(Continued on following page)

and content of general liability policies and many other forms of insurance which are in no sense "required." Although the state has established a Workers' Compensation Commission which regulates workers' compensation insurance, it has likewise established a State Board of Insurance which regulates other types of insurance, both required and non-required. Although state law prescribes the procedural and substantive sequelae which flow from the issuance of a workers' compensation policy, it does the same in the case of all other forms of required and non-required insurance. In short, none of the factors to which the respondents point gainsays the clear and unequivocal pronouncement of the Supreme Court of Texas that workers' compensation insurance in Texas "is strictly elective." *Consolidated Underwriters v. King*, 160 Tex. 18, 325 S.W.2d 127, 130 (1959).²

(Continued from previous page)

employer who has chosen not to subscribe to workers' compensation insurance. The only state law limitation on such plans is that they do not trigger the benefits accruing to the employer under the Texas Workers' Compensation Act unless they include insurance or self-insurance which meets the terms of that Act.

² The respondents' reliance on the fact that Texas requires employers to give notice that they have declined to subscribe to workers' compensation insurance is curious; that requirement further demonstrates that such insurance is not required, else no provision for notice of non-subscription would be necessary.

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